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DATE: October 12, 2015

RE: Comment on "Proposed Updates to the CEQA Guidelines" of August 11, 2015

This is Comment on the "Proposed Updates to the CEQA Guidelines," dated August 11, 2015, encompassing a number of changes proposed to further eviscerate the California Environmental Quality Act and the ability of Californians to enforce its mandate of environmental protection by weakening existing Guidelines.

The OPR sets a deadline for on a date that is a holiday for many, further discouraging the public participation at the heart of CEQA's mandate. This Comment is incomplete due to that consideration.

1. §15064.7 Thresholds of Significance (pp. 12-19)

The proposed language obfuscates and vastly broadens the use of unauthorized and unadopted "thresholds of significance," contrary to the cases cited as authority. The proposed new subsection (d) would allow an agency to "adopt ***or*** use an environmental standard as a threshold of significance…an 'environmental standard' is a *rule of general application* that is adopted by the agency through a public review process and that is all of the following: (1) a quantitative, *qualitative* or performance requirement *found in an ordinance, resolution, rule, regulation, order, or other environmental requirement of general application*; (2) adopted for the purpose of environmental protection; (3) addresses the same environmental effect caused by the project; and, (4) is designed to apply to the type of project under review." (p.19, emphasis added.)

The proposal is internally contradictory, since it essentially *exempts* the "use" of an undefined "environmental standard" by failing to require its formal adoption. Second, the definition of "'environmental standard'" is so broad as to allow any undefined "qualitative" performance requirement or "environmental requirement," anywhere that may be found, to be a "rule of general application" to be adopted by the agency. The "public review process" language is meaningless, since *no* public review is provided for the proposed actual threshold of significance. The entire proposal should also be scrapped because it does not conform to any of the cases cited, or to §§21000, 21082, and 21083.

2. **§15168 "Within the Scope" of a Program EIR** (pp. 20-24.)

OPR again proposes another weakening of CEQA, contrary to CEQA's mandate requiring environmental review and mitigation of potential environmental impacts, and the proposal removes public participation in that process defines CEQA's central purpose.

The proposed changes include changing the word "subsequent" as applied to an original programmatic EIR to "later," and eliminating the fair argument standard for determining whether additional review is required for agency actions subsequent to the initial review, instead imposing a public burden of proving significance of impacts rather than the fair argument standard. Those proposed changes also make public redress to agency actions not covered in a program EIR much more difficult. As proposed, the entire determination of significance and the public process for making that determination would be made entirely by the agency instead of through a public review process.

The "relevant factors" proposed for the agency to use in making what should be a public process, are expanded to be so broad that they would essentially eliminate *all* review after what is often an overly general "program" review that fails to actually review the physical impacts of the implementation of a "program." For example, the proposed agency determination "may" consider "consistency of the later activity with the type of allowable land use, overall planned density and building intensity, geographic area analyzed for environmental impacts, and description of covered infrastructure, as presented in the project description or elsewhere in the program EIR." Nothing compels the agency to consider any physical impact or cumulative impacts on the environment of actions to physically implement the "program" or project.

The change at subsection (3) also removes CEQA's principal requirement to mitigate the impacts of the project, and subsection (4) allows another "checklist" to determine "whether the environmental effects of the operation were within the scope of the program EIR."

The proposed changes should be rejected because they do not conform with CEQA or case law that the proposal ignores. (*Natural Resources Defense Council, Inc. v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 283; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 396.)

3. §15152 "Clarifying Rules on Tiering" (pp. 25 - 28)

The proposed changes add a subsection (h) creates an internal conflict by claiming some Guidelines should supersede or obviate the existing provisions on tiering that apply to program EIRs and Master EIRs, and add another exemption from review under §15152 for "Infill projects."

The biased proposal would effectively remove the requirements of, *e.g.*, §15152(f), requiring a later EIR when the initial study or later analysis indicate the later version of the project may cause significant impacts that were not adequately addressed in the prior EIR, eliminate specific requirements for analyzing cumulative impacts of a later project, and remove mitigation requirements. These requirements would be a nullity under this proposed change here and the proposed changes to §15168. The internal conflict created by the proposed change, and the further implied exemption from subsequent review of overly general "program" EIR's is not permissible.

4. §15182 "Transit Oriented Development Exemption" (pp. 29-33) for "Projects Pursuant to a Specific Plan"

The proposed change exempts all so-called "transit oriented development" from CEQA review under a proposed statutory exemption. First, the Guideline does not conform with CEQA or the stated statutory amendments, since it vastly expands their stated application to "purely residential projects," and "a commercial project with a floor area ratio of at least 0.75," whereas the statutory provisions apply only to "employment center project(s)." (Pub. Res. Code §§21099(a)(1); 21155.4.)

The proposal changes existing Guidelines §15182, which applied to "Residential Projects Pursuant to a Specific Plan" is changed to exempt from environmental review virtually *all* projects that are "located within one-half mile of an existing or planned rail transit station, ferry terminal served by either a bus or rail transit service, or the intersection of two or more major bus routes with a frequency of service interval of 15 minute or less during the morning and afternoon peak commute periods." A "planned" transit station, etc., is any "facility that is scheduled to be completed within the planning horizon."

The proposed amendment sets a statute of limitations for that exemption of 30 days, which conflicts with the statute of limitations for exemptions defined elsewhere. This is particularly important, because agencies are not required to allow public comment or hearing on exemptions, or to promptly make public an agency's exemption determinations.

The proposed amendment may not be lawfully adopted, because it conflicts with CEQA, with the amendments to CEQA cited, and with other Guidelines, and is contrary to the environmental review and public participation requirements of CEQA.

5. §15301 Existing Facilities Exemption (pp. 34-37)

The proposal makes changes to §15301 that far exceed its statutory authority or any reasonable interpretation of case law, and change the substance of §15301 by changing the definition of "existing facilities" from "minor alteration" "involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination" to "involving negligible or no expansion of historic use." Thus if an existing facility was historically more environmentally detrimental and later approved with fewer impacts, it would be exempted as an "existing facility" based on present alterations to the more detrimental "historic" use. That proposal clearly conflicts with CEQA's mandate to identify and mitigate environmental impacts to existing conditions, and conflicts with other Guidelines and law on baseline determinations.

The proposal at subsection (c) also adds exemptions from CEQA review "alternations such as the addition of bicycle facilities, including but not limited to bicycle parking, bicycle-share facilities and bicycle lanes, pedestrian crossings, and street trees, and other similar improvements that do not create additional automobile lanes." Bicycle lanes often have serious impacts on traffic congestion and air quality by removing traffic lanes and parking and impeding vehicle and transit traffic that must be analyzed and mitigated under CEQA. Far from being "existing facilities," or "minor alterations" to existing facilities, the removal or change of use of public roadways should not be exempted from CEQA review as an "existing facility."

Nothing in the case law cited or CEQA allows broadening an exemption, particularly the existing facilities exemption as proposed here.

6. "Proposed New Section 15234" "Remand" (pp.72-75)

Under the pretense of "clarification," the OPR proposes reducing the remedies for court decisions enforcing CEQA to toothless, ineffectual measures that requires no remedy at all. The proposal clearly conflicts with Pub. Res. Code §21168.9, and is unconstitutional since it deprives

plaintiffs of a just remedy and reduces CEQA to a paper exercise. CEQA remedies are covered by section 21168.9, which requires no "clarification," and has already been "clarified" by abundant case law.

Contrary to CEQA, the proposed new subsection (c) also allows an agency to "proceed with a project, or individual project activities, during the remand period where the court has exercised its equitable discretion to leave project approvals in place or in practical effect during that period because the environment will be given a greater level of protection if the project is allowed to remain operative than if it were inoperative during that period." The proposal thus removes the court's jurisdiction to fashion a remedy that includes suspending such project activities under section 21168.9, removes that option, and/or delegates it to the agency that committed the violation of CEQA in the first place.

The proposed new subsection (d) also removes the court's jurisdiction and allows the violating agency to determine the "scope" of environmental review.

The proposed new guideline clearly conflicts with CEQA and with Section 21168.9.

7. §15126.2 Consideration and Discussion of Significant Environmental Impacts (pp.76-80)

The proposal would overturn recent case law in, *e.g., California Clean Energy Committee v. City of Woodland* (2014) 225 CalApp.4th 173, 209), requiring environmental review of greenhouse gas ("GHG") impacts, by improperly allowing including mitigation measures into the impacts analysis. (*e.g., San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 663-664.) The provision should delete its proposed text after the second sentence, so that it reads as follows: "(b) Energy Impacts. The EIR shall include an analysis of whether the project will result in significant environmental effects due to wasteful, inefficient, or unnecessary consumption of energy. This analysis should include the project's energy use for all project phases and components, including transportation-related energy, during construction and operation. ~~In addition to project design, other relevant considerations may include, among others, the project's size, location, orientation, equipment use and any renewable energy features that could be incorporated into the project. Guidance on information that may be included in such an analysis is presented in Appendix F.) This analysis is subject to the rule of reason and shall focus on energy demand that is caused by the project.~~"

8. §15155 "Water Supply Analysis; City or County Consultation with Water Agencies" pp. 81-88)

This commenter will, if allowed, submit comment on this proposal at a later time.

9. §15125 Environmental Setting (pp. 89 - 95)

The proposed changes would nullify CEQA's fundamental requirement to establish the existing conditions constituting the "environmental setting" from which an EIR analyzes the impacts of a project. The drastic changes are absurd, unnecessary and conflict with the basic requirement of environmental review. Nothing in the existing language of §15125 requires change to conform with case law, including *Neighbors for Smart Rail.*

The proposed change eliminates the baseline requirement itself, which states, "(a) An EIR must include a description of the physical environmental conditions in the vicinity of the project**, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a**

local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." The proposal eliminates the words above that are in bold type.

After eliminating the meaning of the provision, the proposed amendment adds this falsehood: "The purpose of this requirement is to give the public and decision makers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts." The purpose of the baseline is to fulfill CEQA's informational purpose on the existing conditions before a proposed project is approved, as already stated in the existing subsection (c).

The proposed changes then eliminate that requirement by adding: "(1) *Generally*, the lead agency should describe physical environmental conditions as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective." The proposed language then meanders into absurdity: "Where *existing conditions change or fluctuate over time*, a lead agency may define existing conditions by referencing *historic* conditions that are supported with substantial evidence. In addition to existing conditions, a lead agency may also use a second baseline consisting of projected future conditions that are supported by reliable projections based on substantial evidence in the record." (p. 94, emphasis added.)

First, existing conditions will, of course, nearly always "change over time," which is why it is so important to accurately set forth the existing conditions to determine whether a proposed project will result in direct or cumulative changes to the environment in combination with other changes. Further, as previously noted, the manipulation of the language to allow "historic" conditions, meaning conditions in the past rather than existing conditions, would not result in an accurate analysis of impacts from a project. Nothing in *Neighbors for Smart Rail* or any other case law approves the use of "historic" conditions as an existing conditions baseline.

Second, the "second baseline" of "projected future conditions" is completely contrary to the definition and purpose of the baseline of existing conditions. Future conditions do not exist and projections are not "physical environmental conditions." Further, using "future conditions" inevitably results in underestimating a project's impacts. For example, degradation of transportation or air quality impacts that will occur with uncontrolled growth means the degraded future condition is the "baseline," minimizing the actual impacts that would be measured for existing conditions. Furthermore, future conditions are the outcome of the analysis when measuring the impacts of a project on existing physical environmental conditions, and are part of the cumulative impacts analysis, which would be negated by the proposed amendment.

Neither "historic" conditions nor "future" conditions conform to a common sense definition of *existing* conditions, which is the only objective starting point to measure impacts.

The amendment then proposes adding language allowing a lead agency to demonstrate--to whom--that using a baseline of existing conditions "would be either misleading or without informative value to decision-makers and the public" to enable itself to "use a different baseline." The amendment adds, "Use of projected future conditions must be supported by reliable projections based on substantial evidence in the record."

The existing conditions baseline is essential for measuring both direct and cumulative impacts. (*e.g., County of Amador v. El Dorado County Water Agency* (199) 76 Cal.App.4th 931, 953 ["[W]ithout such a description, analysis of impacts, mitigation measures and project

alternatives becomes impossible"].) Twisting it to allow an inaccurate, distorted result that does away with cumulative impacts analysis is contrary to CEQA.

10. §15126.4 Consideration and Discussion of Mitigation measures proposed to Minimize Significant Effects. (pp. 98-101.)

The existing Guidelines §15126.4 and case law prohibit an EIR from deferring identifying and discussing feasible mitigation measures for each significant impact identified in the EIR to "some future time." The proposed amendment turns that prohibition on its head and *allows* deferring the discussion of mitigation in an EIR to an unstated future time. While the provision prohibited deferral is retained, the amendment adds the following contradictory language: "Deferral of the specific details of mitigation measure *may be permissible* when it is impractical or infeasible to fully formulate the details of such measures at the time of project approval, or where a regulatory agency other than the lead agency will issue a permit for a project that will impose mitigation requirements, provided that the lead agency has: 1) fully evaluated the significance of the environmental impact and explained why it is not feasible or practical to formulate specific mitigation at the time of project approval; 2. commits to mitigation, 3. lists the mitigation options to be considered, analyzed and possibly incorporated in the mitigation plan; and 4. adopts specific performance standards that will be achieved by the mitigation measures."

The proposed waffle words are internally contradictory and contradict a large body of case law requiring mitigation measures to be completed before project approval. The proposed amendment also contradicts CEQA's statutory requirement of effective mitigation set forth in enforceable findings. While performance measures should be set forth for mitigation measures, that discussion must take place before project approval or it is pointless.

11. §15004. Time of Preparation

The proposed amendment would remove the requirement of environmental review *before* entering into an agreement between the Lead Agency and a project applicant, by adding language allowing such an agreement *before* required environmental review of that agreement, contrary to established case law. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 132). The proposed change disingenuously claims that such an agreement would not "constitute approval" of a project, *i.e.,* "it shall not grant any vested rights prior to compliance with CEQA." The proposed amendment also contradicts the requirement of neutrality of the Lead Agency, by stating that Agency could demonstrate "interest in, or inclination to support, a project." ((See, *e.g., Citizens for Ceres v. Superior Court of Stanislaus County* (2013) 217 Cal.app.4th 889, 917 ["Before completion of environmental review and project approval, the law presumes the lead agency is neutral and objective and that its interest is in compliance with CEQA. It is this neutral role which could cause it to reject the project or certify an EIR supporting one of the project alternatives or calling for mitigation measures to which the applicant is opposed. The agency's unbiased evaluation of the environmental impacts of the applicant's proposal is the bedrock on which the rest of the CEQA process is based."].)

12. §15051. Criteria for Identifying the Lead Agency. (pp.112-113.)

More contradictory and weakening language is proposed to allow a merry-go-round of agencies to claim they are the "lead agency" that may "act first on the project in question" at §15051(c). Under the proposed amendment, the public would not be able to know the time

limits for appealing a subordinate agency's action to an elected final decisionmaking body, because any agency could claim to be the lead agency at any time. The proposed amendment is contrary to CEQA's requirement of lead agency neutrality. (See, *e.g., Citizens for Ceres v. Superior Court of Stanislaus County, supra,* 217 Cal.App.4th at p.917.)

13. §15061. Review for Exemption. (pp. 114 - 115.)

The existing language at subsection (3) states that "A project is exempt from CEQA if: (3) The activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment." The proposed amendment states the opposition in contradictory words: "A project is exempt from CEQA if: (3) The activity is covered by the common sense exception that CEQA applies only to projects with the potential for causing a significant effect on the environment." Perhaps the term "common sense rule" or some other language could fix this mistake.

14. §15124. Project Description (pp. 136-137.)

The proposed amendment allowing an EIR's project description to "discuss the project benefits" is contrary to the objectivity that must define environmental review and decisionmaking. That language should not be added. It is not consistent with *County of Inyo* or any other requirement, and it is contrary to the objectivity required by CEQA. (*e.g., Citizens for Ceres v. Superior Court of Stanislaus County, supra,*217 Cal.App.4th at p. 917.)

15. §15269. Emergency Projects (pp. 140-141.)

The amendment proposes expanding the emergency project statutory exemption by including "[e]mergency repairs" that "require a reasonable amount of planning." The exclusion from that exemption states that it does not include "long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term." The proposed language weakens or nullifies the long-term exclusion by stating, "but this exclusion does not apply (i) if the anticipated period of time to conduct an environmental review of such a long-term project would create a risk to public health, safety or welfare, or (ii) if activities (such as fire or catastrophic risk mitigation or modifications to improve facility integrity) are proposed for existing facilities in response to an emergency at a similar existing facility." Assuming this exception to the exclusion to the exemption could be comprehended, it is unnecessary and contradicts the meaning of an emergency by allowing long-term planned projects to qualify as "emergency repairs."

16. §15357. Discretionary Project (pp.142-143.)

The language proposes to further weaken CEQA by broadening the meaning of a non-discretionary or "ministerial" project, not requiring environmental review. The existing language defines the non-discretionary "determination" as "whether there has been conformity with applicable statutes ordinances, or regulations." The proposed language would change that limited definition "whether there has been conformity with applicable statutes, ordinances, regulations, *or other fixed standards.* The key question is whether the approval process involved allows the public agency to shape the project in any way that could materially respond to any of the concerns which might be raised in an environmental impact report." (p.142, emphasis added.) If an agency is allowed to claim a project conforms to any "fixed standards," and thus not subject to CEQA requirements, the only approval process will be a non-public rubber stamp of a

building or other permit. That language creates another loophole that is contrary to CEQA's mandate to identify and mitigate a project's impacts on the environment.

Due to time constraints, this comment does not include comment on proposed changes to the "Environmental Checklist" at Appendix G and other proposed amendments not covered here, but such comment will be submitted as time permits on final notice of actual proposed amendments.

For the foregoing reasons, the proposed Guidelines amendments should be rejected.

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